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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 838.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HAROLD A. FOSTER, FRANK E. WINCHELL, WILLIAM S. EDWARDS, AND HARRY H. PLATT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED DECEMBER 29, 1913.

(23989.)

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1 Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Judge of the District Court of the United States for the District of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States of America and Harold A. Foster, Frank E. Winchell, William S. Edwards, and Harry H. Platt, a manifest error hath happened, to the great damage of the said United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, on the twenty-ninth day of November, current, in the said Supreme Court, that, the record and procedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of November, in the year of our Lord one thousand nine hundred and thirteen.

[SEAL.] CHARLES K. DARLING,
Clerk of the District Court of the United States,
District of Massachusetts.

Allowed by
JAMES M. MORTON,
U. S. District Judge.

2 Return of District Court on writ of error.

DISTRICT COURT OF THE UNITED STATES,
District of Massachusetts, ss:

And now, here, the judge of the District Court of the United States, in and for the District of Massachusetts, makes return of this writ by annexing hereto and sending herewith, under the seal of the said District Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States Circuit Court of Appeals for the First Circuit, as within commanded.

In testimony whereof, I, Charles K. Darling, clerk of said District Court of the United States, in and for the District of Massachusetts, have hereto set my hand and the seal of said court, this thirteenth day of November, A. D. 1913.

[SEAL.] CHARLES K. DARLING, *Clerk.*

3 *Transcript of record of District Court.*

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

At a District Court of the United States, begun and holden at Boston, within and for the District of Massachusetts, on the second Tuesday of September, being the ninth day of September, in the year of our Lord one thousand nine hundred and thirteen, before the honorable James M. Morton, jr., district judge.

UNITED STATES, BY INDICTMENT, v. HAROLD A. FOSTER, FRANK E. WINCHELL, WILLIAM S. EDWARDS, and HARRY H. PLATT.	No. 641.	Criminal docket.

The jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that before and at the time of the commission of the offence hereinafter charged one Harold A. Foster, of North Brookfield, in said district, was duly appointed, qualified, and acting as postmaster of the United States post-office at said North Brookfield, said post-office then being classified by the Postmaster General of the United States as a second-class office, and the salary of said postmaster fixed by said Postmaster-General, pursuant to law and the regulations duly established by said Postmaster General thereunder, at the sum of two thousand dollars a year; that said salary was based and ascertained upon the gross receipts of said post-office for the twelve months next preceding the thirty-first day of March, in the year nineteen hundred and eleven, and said salary was subject and required by law to be readjusted by said Postmaster General annually, and the next succeeding readjustment thereof was required to be made by said Post-

4 master General in accordance with the gross receipts of said post-office, as shown by the quarterly returns of said postmaster to the Auditor for the Post Office Department of the United States for the four quarters next preceding the thirty-first day of March in the year nineteen hundred and twelve, and said readjustment to take effect at the beginning of the fiscal year next ensuing, to wit, on the first day of July, in the year nineteen hundred and twelve; that said Postmaster General was required by law and the regulations aforesaid, for the purpose of readjusting such salary as aforesaid, not to include in said gross receipts of said post office the moneys received by said postmaster during said twelve months

preceding said thirty first day of March, in the year nineteen hundred and twelve, from the sale of stamps to any person or persons in large or unusual quantities, which were to be used for the prepayment of postage upon matter to be deposited in the mails of the United States for mailing and delivery at any United States post-office other than said North Brookfield post office, or to be used in the prepayment of postage upon any matter deposited for such mailing and delivery at said North Brookfield post-office, if such matter would in the ordinary and usual course of the business of the person or persons depositing such matter be deposited for mailing and delivery at a United States post-office other than said North Brookfield post-office; that Frank E. Winchell, of said North Brookfield, was at all the times aforesaid president and general manager of the Oxford Linen Mills, a corporation organized by law and having its usual place of business at said North Brookfield; that William S. Edwards and Harry H. Platt, both of New York, in the State of New York, were at all said times officers of the Sterling Debenture Corporation, said Edwards being treasurer and said Platt being assistant treasurer of said corporation, and said Sterling Debenture Corporation being a corporation organized by law and having its usual and principal place of business in said New York; that said Harold A. Foster, postmaster as aforesaid, said Frank E. Winchell, said William S. Edwards, and said Harry H. Platt, well knowing all the premises, on the second day of June in the year nineteen hundred and eleven, at said North Brookfield, unlawfully did conspire together to defraud the United States of its money and property in the manner following; that is to say, that said Winchell, as president and in behalf of said Oxford Linen Mills, should from time to time purchase from said Foster, postmaster as aforesaid, with the knowledge, consent, and connivance of said Foster, large quantities of United States postage stamps; that said Winchell should send said stamps to said Sterling Debenture Corporation at said New York, and that said Edwards and Platt, as such officers, should cause said Sterling Debenture Corporation to use said stamps for the prepayment of postage upon matter to be deposited by said Sterling Debenture Corporation in said New York post-office or in some post-office other said North Brookfield post-office; with the view and intent of them, said Foster, Winchell, Edwards, and Platt, by means of the purchase of stamps as aforesaid, irregularly and improperly to increase the gross receipts of said North Brookfield post-office during the period of twelve months beginning on the first day of April, in the year nineteen hundred and eleven, and ending on the thirty first day of March, in the year nineteen hundred and twelve, and thereby to enable said Foster as such postmaster to make returns as aforesaid to the Auditor of the Post Office Department as a basis for the readjustment of said Foster's salary as such postmaster for the fiscal year beginning on said first day of July, in the year nineteen hundred and twelve, in the manner aforesaid, which returns should include the sales of stamps so made

to said Winchell for the use of said Sterling Debenture Corporation, as aforesaid, in addition to sales of stamps made by said Foster as such postmaster at said North Brookfield to other persons in the regular, usual, and ordinary course of the business of said North Brookfield post-office, and with the view and intent on the part of said Foster, Winchell, Edwards, and Platt that said Foster, postmaster as aforesaid, should, in violation of the regulations of said Post Office Department and for the purpose of fraudulently increasing said Foster's salary and compensation as such postmaster, knowingly and fraudulently fail to report to the First Assistant Postmaster General the fact, which said Foster well knew, that such stamps so to be sold to said Winchell were to be used by said Sterling Debenture Corporation, as aforesaid, and with the further intent on the part of said Foster as such postmaster that such sales to said Winchell for the use of said Sterling Debenture Corporation, as aforesaid, should in violation of said post-office regulation be included and deemed to be a part of the gross receipts of said
6 North Brookfield post-office for the period aforesaid, and be made in part the basis of the readjustment in the manner aforesaid of said Foster's salary as such postmaster for said fiscal year beginning on said first day of July, in the year nineteen hundred and twelve; that all of the acts and things hereinbefore alleged were to be done by said Foster, Winchell, Edwards, and Platt knowingly, willfully, and fraudulently for the purpose and with the intent that said Postmaster General, in ignorance of such sales of stamps by said Foster as such postmaster to said Winchell for the use of said Sterling Debenture Corporation, as aforesaid, should increase the salary of said Foster as such postmaster upon such readjustment for said fiscal year beginning on said first day of July, in the year nineteen hundred and twelve, by a sum of money in excess of that which said Foster as such postmaster would be lawfully entitled to receive, and to cause and procure such excessive sum to be paid as salary to said Foster as such postmaster, and thereby to cheat and defraud the United State thereof:

That in pursuance of such unlawful conspiracy and to effect the object thereof, on the first day of July in the year nineteen hundred and eleven, said Foster, as such postmaster, did make a false return to the Auditor for the Post Office Department of the gross receipts of said North Brookfield post office for the quarter ended on the thirtieth day of June in the year nineteen hundred and eleven;

That in further pursuance of such unlawful conspiracy and to effect the object thereof, said Frank E. Winchell on said second day of June in the year nineteen hundred and eleven, at said North Brookfield, did send by registered mail to said Sterling Debenture Corporation at said New York a certain package;

That in further pursuance of such unlawful conspiracy and to effect the object thereof the said Frank E. Winchell, on said second day of June in the year nineteen hundred and eleven, at said North Brookfield, as president and general manager of said Oxford Linen

Mills, did purchase from said Harold A. Foster, as such postmaster, a large quantity of postage stamps, to wit, postage stamps of the amount and value of two hundred dollars.

And the jurors aforesaid, upon their oaths aforesaid, do further present that Harold A. Foster and Frank E. Winchell, both
7 of North Brookfield, in said district of Massachusetts, and William S. Edwards and Harry H. Platt, both of New York, in the State of New York, on the second day of June in the year nineteen hundred and eleven, at said North Brookfield, unlawfully did conspire together to commit an offence against the United States of America, that is to say, the offence denounced by section two hundred and six of the act of March fourth, nineteen hundred and nine, entitled "An act to codify, revise, and amend the penal laws of the United States," which said offence was to be committed by the said Harold A. Foster as postmaster of the United States post office at said North Brookfield in the manner following, that is to say, that the said Harold A. Foster, as such postmaster, should, in violation of the provisions of said section of said act, knowingly and fraudulently make false returns to the First Assistant Postmaster General for the purpose of fraudulently increasing said Foster's salary and compensation as such postmaster by knowingly and fraudulently failing to report to said First Assistant Postmaster General in the reports of the gross receipts of said post office required by law and the regulations of the Post Office Department of the United States to be made monthly to the said First Assistant Postmaster General, large and irregular sales of postage stamps to be made by said Foster, as such postmaster, to said Winchell, as president and general manager of the Oxford Linen Mills, a corporation organized by law and having its usual place of business at said North Brookfield, which said postage stamps, as said Foster, Winchell, Edwards, and Platt well knew were not to be used by said Oxford Linen Mills or by said Winchell, or by any other person, in prepayment of postage upon matter to be deposited in said North Brookfield post office, but which were to be used by the Sterling Debenture Corporation, a corporation duly organized by law and having its principal place of business at New York, in the State of New York, for the prepayment of postage upon matter to be deposited in the United States post office at said New York, or in some post office other than said North Brookfield post office, and with the intent on the part of said Foster, Winchell, Edwards, and Platt, and for the purpose of fraudulently increasing the compensation of said Foster, as such postmaster, for the fiscal year beginning July first, in the year nineteen hundred and twelve; that in pursuance of such unlawful conspiracy and to
8 effect the object thereof, the said Frank E. Winchell, on said second day of June, in the year nineteen hundred and eleven, at said North Brookfield, as president and general manager of said Oxford Linen Mills, did purchase from said Harold A. Foster, as such postmaster, a large quantity of postage stamps, to wit, postage stamps of the amount and value of two hundred dollars;

That in further pursuance of such unlawful conspiracy and to effect the object thereof, on the first day of July in the year nineteen hundred and eleven, said Foster, as such postmaster, did make a false return to the Auditor for the Post Office Department of the gross receipts of said North Brookfield post office for the quarter ended on the thirtieth day of June in the year nineteen hundred and eleven;

That in further pursuance of such unlawful conspiracy and to effect the object thereof, said Frank E. Winchell, on said second day of June in the year nineteen hundred and eleven, at said North Brookfield, did send by registered mail to said Sterling Debenture Corporation at said New York, a certain package.

This indictment was presented by the grand jury at the March term, A. D. 1913, when, to wit, March 24, 1913, the Honorable James M. Morton, district judge, sitting, the said Harold A. Foster, Frank E. Winchell, William S. Edwards, and Harry H. Platt, were set to the bar and had this indictment read to them, whereupon they severally said that thereof they were not guilty.

On the same day it was ordered by the court that each defendant be given two weeks to file dilatory plea.

On the fifth and seventh days of April, A. D. 1913, respectively, the following demurrers were filed:

Demurrer of Frank E. Winchell. (Filed April 5, 1913.)

The defendant Frank E. Winchell hereby withdraws his plea of "not guilty" to the indictment in the above-entitled case, and by protestation not confessing or acknowledging any of the matters in the first count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demurs to said first count in and of said indictment and for cause of demurrer shows:

First. That it appears by said first count in and of said indictment that the said first count thereof does not allege as against
9 said defendant any facts sufficient to constitute a crime.

Second. That it appears by said first count in and of said indictment that the said first count thereof does not allege as against said defendant any facts sufficient to constitute a crime at common law.

Third. That it appears by said first count in and of said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Fourth. That it appears by said first count in and of said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Fifth. That each and every regulation of the Postmaster General of the United States in said first count set forth is invalid.

And the said defendant Frank E. Winchell hereby withdraws his plea of "not guilty" to the indictment in the above entitled case,

and by protestation not confessing or acknowledging any of the matters in the second count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demurs to said second count in and of said indictment and for cause of demurrer shows:

Sixth. That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendant any facts sufficient to constitute a crime.

Seventh. That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Eighth. That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Ninth. That each and every regulation of the Postmaster General of the United States in said second count set forth is invalid.

Tenth. That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendant with sufficient particularity and certainty which of the several crimes denounced by section 206 of the act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States" the defendant is charged with violating.

Wherefore and for various divers other good causes of demurrer appearing in the said indictment and in the said first count and in the said second count thereof, respectively, the defendant Frank E. Winchell demurs thereto and to each of said counts, and prays the judgment of this honorable court that the said indictment be dismissed and that he be discharged and dismissed, and that he have such other and further relief as to the court may seem just and proper.

PHILIP RUBENSTEIN,
Attorney for F. E. Winchell.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*
BOSTON, MASS., *April 5th, 1913.*

Now comes Philip Rubenstein, attorney for the above named Frank E. Winchell and makes oath that he is of opinion that there is such probable ground in law for the within demurrer as to make it a fit subject for judicial inquiry and trial, and that it is not intended merely for delay.

DAVID A. ELLIS,
Justice of the Peace.

Demurrer of William S. Edwards and Harry H. Platt. (Filed April 5, 1913.)

The defendants William S. Edwards and Harry H. Platt hereby withdraw their plea of "not guilty" to the indictment in the above

entitled case, and by protestation not confessing or acknowledging any of the matters in the first count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demur to said first count in and of said indictment and for cause of demurrer show:

First. That it appears by said first count in and of said indictment that the said first count thereof does not allege as against said defendants any facts sufficient to constitute a crime.

Second. That it appears by said first count in and of said indictment that the said first count thereof does not allege as against said defendants any facts sufficient to constitute a crime at common law.

Third. That it appears by said first count in and of said in-
11 dictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Fourth. That it appears by said first count in and of said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Fifth. That each and every regulation of the Postmaster General of the United States in said first count set forth is invalid.

And the said defendants William S. Edwards and Harry H. Platt hereby withdraw their plea of "not guilty" to the indictment in the above entitled case, and by protestation not confessing or acknowledging any of the matters in the second count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demur to said second count in and of said indictment and for cause of demurrer show:

Sixth. That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendants any facts sufficient to constitute a crime.

Seventh. That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Eighth. That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Ninth. That each and every regulation of the Postmaster General of the United States in said second count set forth is invalid.

Tenth. That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendants with sufficient particularity and certainty which of the several crimes denounced by section 26 of the act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States," the defendants are charged with violating.

Wherefore and for various and divers other good causes of demurrer appearing in the said indictment and in the said first

12 count and in the said second count thereof, respectively, the defendants William S. Edwards and Harry H. Platt demur thereto and to each of said counts, and pray the judgment of this honorable court that the said indictment be dismissed and that they be discharged and dismissed, and that they have such other and further relief as to the court may seem just and proper.

DAVID A. ELLIS,
Attorney for Edwards and Platt.

BOSTON, MASS., *April 5th, 1913.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Now comes David A. Ellis, attorney for the above named William S. Edwards and Harry H. Platt, and makes oath that he is of opinion that there is such probable ground in law for the within demurrer as to make it a fit subject for judicial inquiry and trial and that it is not intended merely for delay.

PHILIP RUBENSTEIN,
Justice of the Peace.

Demurrer of Harold A. Foster. (Filed April 7, 1913.)

The defendant Harold A. Foster hereby withdraws his plea of "not guilty" to the indictment in the above-entitled case, and by protestation not confessing or acknowledging any of the matters in the first count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demurs to said first count in and of said indictment and for cause of demurrer shows:

First: That it appears by said first count in and of said indictment that the said first count thereof does not allege as against said defendants any facts sufficient to constitute a crime.

Second: That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendants any facts sufficient to constitute a crime at common law.

Third: That it appears by said first count in and of said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

13 Fourth: That it appears by said first count in and by said indictment that the said first count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Fifth: That each and every regulation of the Postmaster General of the United States in said first count set forth is invalid.

And the said defendant Harold A. Foster hereby withdraws his plea of "not guilty" to the indictment in the above-entitled case, and by protestation not confessing or acknowledging any of the matters in the second count in said indictment contained to be true in the manner and form therein set forth and alleged, hereby demurs to

said second count in and of said indictment and for cause of demurrer shows:

Sixth: That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendants any facts sufficient to constitute a crime.

Seventh: That it appears by said second count in and of said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of the statutes and penal laws of the United States therein made and provided.

Eighth: That it appears by said second count in and by said indictment that the said second count thereof does not set forth any facts sufficient to constitute a violation of any valid regulation or regulations of the Postmaster General of the United States.

Ninth: That each and every regulation of the Postmaster General of the United States in said second count set forth is invalid.

Tenth: That it appears by said second count in and of said indictment that the said second count thereof does not allege as against said defendant with sufficient particularity and certainty which of the several crimes denounced by section 206 of the act of March 4, 1909, entitled "An act to codify, revise, and amend the penal laws of the United States," the defendant is charged with violating.

Wherefore and for various and divers other good causes of demurrer appearing in the said indictment and in the said first count and in the said second count thereof, respectively, the defendant Harold A. Foster demurs thereto, and to each of said counts,
14 and prays the judgment of this honorable court that the said indictment be dismissed, and that he have such other and further relief as to the court may seem just and proper.

By his attorney:

TIMOTHY HOWARD,
608 Slater Bldg., Worcester, Mass.

WORCESTER, MASS., *April 7, 1913.*

COMMONWEALTH OF MASSACHUSETTS, *Worcester, ss:*

Now comes Timothy Howard, attorney for the above named Harold A. Foster, and makes oath that he is of the opinion that there is such probable ground in law for the within demurrer as to make it a fit subject for judicial inquiry and trial and that it is not intended merely for delay.

Before me.

WILLIAM A. SCOLLEN,
Justice of the Peace.

This cause was thence continued to the June term, A. D. 1913, when, to wit, July 14, 1913, the same was set down for hearing on demurrers and heard in part by the court, the Honorable James M. Morton, district judge, sitting as aforesaid.

On the twenty-first day of July, A. D. 1913, this cause was again set down for hearing and fully heard by the court on demurrers.

Said cause was thence continued under advisement to the present September term, A. D. 1913, when, to wit, October 2, 1913, an opinion of the court is announced, sustaining demurrers.

It is thereupon, to wit, October 2, 1913, considered by the court, the Honorable James M. Morton, jr., district judge, sitting as aforesaid, that the said demurrers be, and the same are hereby, sustained, and that the indictment in this cause be quashed, and that the said Harold A. Foster, Frank E. Winchell, William S. Edwards, and Harry H. Platt, defendants, be discharged and go without day.

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

15 Opinion of the court. (October 2, 1913.)

MORTON, J.: The first count of this indictment charges the defendants with having conspired to defraud the United States. The alleged object of the conspiracy was to obtain for the defendant Foster a larger salary as postmaster at North Brookfield than he was by law and by the regulations of the Post Office Department entitled to. This object was to be accomplished, according to the allegations of the indictment, in the following manner: One of the other defendants, Winchell, was to buy at the North Brookfield post office large quantities of stamps, which he was to send to the other two defendants, Edwards and Platt, at New York City, for use there. Foster was to include the proceeds of these sales in his returns of the gross receipts of the North Brookfield post office to the Auditor for the Post Office Department, but was not to report the sales to the First Assistant Postmaster General as unusual ones, to the end that the receipts from such sales should be deemed to be part of the gross receipts of said post office, and, consequently, should be made in part the basis upon which Foster's salary was determined. It is alleged that the regulations of the department required large or unusual sales for use outside the district to be reported by the postmaster to the First Assistant Postmaster General, and further provided that such sales should not be included by the officials of the Post Office Department in the "gross receipts" upon which the postmaster's salary was fixed.

The defendants have demurred to this count on several formal or technical grounds, none of which seems to me to be well taken. The principal contentions of the defendants are that by statute Foster was entitled to a salary based upon "gross receipts"; that "gross receipts" included all sales, usual or unusual; that the regulations of the Postmaster General requiring unusual sales to be deducted from gross receipts for the purpose of fixing the postmaster's salary were contrary to the statute, and were invalid; that the effect of the alleged conspiracy, if successful, would be to procure for Foster only what he was legally entitled to, and not to defraud the United States.

By the provisions of section 5 of the act of July 12, 1876 (2 U. S. Comp. Stat., 2609), postmasters are divided into four classes. The second class is defined as including all those whose annual sal-
16 aries are between $2,000 and $3,000. The salaries of the second-class postmasters are fixed by the act of March 3, 1883 (2 U. S. Comp. Stat., 2619), which is entitled "An act to adjust the salaries of postmasters," and provides in substance "that the respective compensation of postmasters of the second class shall be annual salaries assigned in even hundreds of dollars, to be ascertained and fixed by the Postmaster General from their respective quarterly returns to the auditor * * * at the following rates, namely: Second class, gross receipts $8,000 and not exceeding $9,000, salary $2,000." The Postmaster General, as head of a department, "is authorized to prescribe*d* regulations not inconsistent with law for the governing of his department, the conduct of its officers and clerks, the distribution and performance of its business," etc. (R. S., sec. 161). Under this last statute the Postmaster General made a regulation to the effect that in determining the gross receipts of a post office for the purpose of fixing the postmaster's salary unusual sales of stamps should not be included, and that a statement of all such sales should be made monthly, not to the auditor (to whom gross receipts are reported), but to the First Assistant Postmaster General.

The crucial question upon the first count of the indictment is whether this regulation is valid. Congress itself has by statute undertaken to establish the salaries of second-class postmasters. It has done so by reference to the "gross receipts" of their respective post offices, a definite and unambiguous expression. Such receipts are reported to the auditor every quarter, and the act explicitly make these returns the basis for fixing salaries. Other statutes forbid postmasters from selling stamps or stamped paper at other than the regular prices, from soliciting business for their own offices, from selling outside their own districts, etc. Crim. Code, sec. 208.

The effect of the various statutes taken together is to make the salaries depend upon the gross receipts, and to prevent such receipts (and consequent salaries) from being increased by improper methods. The entire matter appears to be adequately covered by the statutes.

"The whole theory of the act of 1883 is that every postmaster
17 shall receive a salary dependent upon and regulated by the amount of business done at his office. The intent of the statute in this respect appears so plain upon a careful reading of it that it is difficult to elucidate it by argument or illustration." Lamar, J., United States *v.* Wilson, 143 U. S., 24, 28.

The regulation in question is not an attempt to define "gross receipts" (e. g., to say whether money order fees should be included therein), nor to clear up an ambiguity in the statute, nor to supply details lacking in the statute. The proceeds of the sales of stamps contemplated by the alleged conspiracy became part of the gross

receipts of the North Brookfield office, and were to be so reported. The effect of the regulation is to divide gross receipts into two parts, only one of which shall be considered in fixing salaries. The regulation assumes that some person in the department has the power to determine what sales shall be included in the "gross receipts" on which a salary is based. The effect of the regulation is therefore to make salaries dependent, not upon gross receipts returned to the auditor, as provided in the statute, but upon such part thereof as, in the opinion of somebody connected with the Post Office Department, is not unusual, nor for use outside the district.

An administrative officer has no right to substitute by regulation a different—even though it be a better—basis for fixing salaries than that explicitly provided by Congress. Regulations are valid only so far as they accord with and carry out and are not inconsistent with acts of Congress dealing with the same questions. United States *v.* George, 228 U. S., 14; Morrill *v.* Jones, 106 U. S., 466; United States *v.* Eaton, 144 U. S., 687. The function of a regulation is to make a tight joint between the law and the subject-matter to which the law applies.

The regulation in question does not complete and carry out the plan of compensation provided in the statute—no regulation was necessary for that purpose; it ignores the returns of gross receipts to the auditor, which the statute explicitly makes the basis for adjusting salaries; and it sets up instead a substantially different plan under which salaries are based not upon gross receipts returned to the auditor, but upon "ordinary" or "usual" gross receipts as determined by the department.

18 It seems to me that the regulation is inconsistent with the statute, and consequently invalid. I do not overlook the length of time during which the regulation has been in force without question; but the only persons directly affected by it were subordinate officeholders, who would be very reluctant to attack the validity of a regulation made by their superior officer. Acquiescence under such circumstances amounts to very little.

The object of the conspiracy, as alleged in the first count of the indictment, was to defraud the United States by securing for Foster a larger salary than he was entitled to under said regulation. "The offence here charged is predicated both upon the violation of the law and of the regulations made by the Postmaster General in pursuance of them." (Brief of United States attorney.) If the regulation was invalid, Foster was legally entitled to the salary which it was the object of the alleged conspiracy to secure for him. A conspiracy to obtain by improper methods what one is legally entitled to is not punishable as a conspiracy to defraud. United States v. Biggs, 211 U. S., 504; Williamson v. United States, 207 U. S., 425. In Curley v. United States, 130 F. R., 1, relied on by the United States, the object of the conspiracy was to secure for Hughes a salaried position

under the civil service to which he was not legally entitled. The court said (p. 11): "The regulations and requirements (which were subverted) * * * were founded upon law, and were such as the Government had the right to enforce." The decision seems to me in no way inconsistent with the views above expressed. The demurrer to the first count must therefore be sustained.

The second count charges a conspiracy between the same defendants to commit "the offence denounced by section 206 of the Criminal Code." That section provides, inter alia, that whoever being a postmaster shall, for the purpose of fraudulently increasing his compensation, make a false return, statement, or account to any officer of the United States shall be punished.

Objection is made by the defendants to the certainty and formal sufficiency of this count, but in my opinion it properly charges a conspiracy by the defendants, the object of which was that Foster should make false returns to the First Assistant Postmaster General for the purpose of fraudulently increasing Foster's salary as post-
19 master, by knowingly and fraudulently failing to report to him, in the report of gross receipts required to be made monthly to the First Assistant Postmaster General, large and irregular sales of postage stamps to be made by Foster to the defendant Winchell for use in New York City, outside the North Brookfield district.

It is said for the defendants that no such report of gross receipts as is described in the indictment was, in fact, required of Foster; that under the law and the regulations of the department gross receipts were reported quarterly to the auditor, and unusual sales were reported quarterly in a letter to the First Assistant Postmaster General. But such regulations and reports are matters of fact; the allegations in the indictment are explicit, and on demurrer must be taken as true. The question whether the failure to report to the First Assistant Postmaster General unusual sales falsified the report to the auditor also involves questions of fact which cannot be determined on demurrer.

The crime denounced by section 206 of the Criminal Code includes two essential elements, (1) that a return shall be made which was known to be false; and (2) that such false return shall have been made "for the purpose of fraudulently increasing compensation." It is not criminal under said section to make a false return except for the purpose therein stated. From the allegations of the second count of the indictment it clearly appears that the purpose of the alleged false return was to secure for Foster only what he was, in accordance with the views hereinbefore expressed, legally entitled to receive. The making of a false return for such a purpose was not a crime under said section, and the alleged conspiracy to do so was not a conspiracy to commit the offence denounced thereby.

Demurrer sustained as to both counts of the indictment.

20 Petition of the United States of America for a writ of error and assignment of errors. (Filed Nov. 1, 1913.)

Petition for writ of error.

Now comes the United States of America, by its attorney, Asa P. French, and complains that in the record and proceedings, and also in the rendition of a decision and judgment in a plea between the petitioner and one Harold A. Foster, of North Brookfield, in the District of Massachusetts; Frank E. Winchell, of said North Brookfield; William S. Edwards and Harry H. Platt, both of New York, in the State of New York, which was heard upon demurrer to the indictment in the above-entitled cause in the District Court of the United States for said district at the June term, to wit, on the fourteenth day of July, A. D. 1913, and was decided at the September term, A. D. 1913, of said court, to wit, on the second day of October in said year, manifest error hath intervened, to the great damage of the petitioner, in that said court did illegally and upon an improper construction of the statutes upon which said indictment was founded, sustain the demurrers thereto, and did quash said indictment; wherefore the petitioner prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

Assignment of errors.

And for errors committed by the court in sustaining said demurrers and quashing said indictment, the petitioner alleges as follows:

1. Said court erred in holding that the first count of said indictment did not well allege a conspiracy by the defendants to defraud the United States, in violation of section 37 of the act of March 4, 1909, chapter 321, commonly called the Federal Criminal Code.

2. Said court erred in holding that the object of the conspiracy, as alleged in said first count of the indictment, was a lawful one, to wit, to increase the gross receipts of the post office at North Brookfield, of which the defendant Foster was postmaster, by the purchase of postage stamps in large and unusual quantities, to be used by other defendants upon mail matter to be deposited in the post office at New York, in the State of New York, or at some office other than said North Brookfield post office.

21 3. Said court should have held that the object of the conspiracy alleged in the first count of said indictment was fraudulent, and that said count well alleged a conspiracy to defraud the United States in view of the provisions of section 208 of said Criminal Code, providing that "whoever being a postmaster shall * * * induce, or attempt to induce, for the purpose of increasing the emoluments or compensation of such postmaster, any person to pur-

chase at such post office * * * postage stamps * * * or sell or dispose of postage stamps, stamped envelopes, or postal cards, otherwise than as provided by law, or the regulations of the Post Office Department, shall be punished."

4. Said court erred in its construction of the provisions of section 5 of the act of July 12, 1876, 2 U. S. Compiled Statutes, 2609, and of the act of March 3, 1883, 2 U. S. Compiled Statutes, 2619, entitled "An act to adjust the salaries of postmasters" and of section 161 of the Revised Statutes of the United States, and in holding that the regulations of the Postmaster General defining gross receipts of second-class post offices, are inconsistent with the provisions of said statutes, as appears from the opinion of the court upon demurrer, filed October 2, 1913.

5. Said court erred in holding that the second count of said indictment did not well allege a conspiracy by the defendants in violation of section 37 of said Criminal Code, to commit an offence against the United States, denounced by section 206 of said Criminal Code.

UNITED STATES OF AMERICA,
By ASA P. FRENCH,
United States Attorney.

22 Citation on writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Harold A. Foster, of North Brookfield, in said district; Frank E. Winchell, of said North Brookfield; William S. Edwards, of New York, in the Southern District of New York; and Harry H. Platt, of said New York, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, District of Columbia, on the twenty-ninth day of November, current, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Massachusetts wherein the United States of America is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James M. Morton, jr., judge of the District Court of the United States for the District of Massachusetts this first day of November, in the year of our Lord one thousand nine hundred and thirteen.

JAMES M. MORTON, JR.,
U. S. District Judge.

23 Officer's return on citation on writ of error.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

BOSTON, *November 5, 1913.*

I hereby certify that on the fifteenth day of November, 1913, I served the within citation on the within-named Harold A. Foster and Frank E. Winchell by giving to each in hand at North Brookfield a true and attested copy of this writ.

Fees: Services, $1.00; travel $4.08—$5.08.

[SEAL.] GUY MURCHIE, *United States Marshal.*
By JAMES W. TIGHE, *Deputy.*

Marshal's No. 9930.

Acknowledgment of service on citation on writ of error.

Nov. 12, 1913.

Service accepted for Platt and Edwards by their attorney.
DANIEL A. ELLIS.

24 Clerk's certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Charles K. Darling, clerk of the District Court of the United States within and for the District of Massachusetts, certify that the foregoing is a true copy of record in the cause entitled No. 641, criminal docket, United States, by indictment, v. Harold A. Foster, Frank E. Winchell, William S. Edwards, and Harry H. Platt, in said District Court determined, the petition for writ of error and the assignment of errors, and also the original citation on writ of error issued in said cause, with the marshal's return of service thereon, and acknowledgment of service.

In testimony whereof I hereunto set my hand and affix the seal of said District Court at Boston, in said district, this thirteenth day of November, A. D. 1913.

[SEAL.] CHARLES K. DARLING, *Clerk.*

(Indorsement on cover:) File No. 23989. Massachusetts D. C. U. S. Term No. 838. The United States, plaintiff in error, vs. Harold A. Foster, Frank E. Winchell, William E. Edwards, and Harry H. Platt. Filed December 29th, 1913. File No. 23989.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
HAROLD A. FOSTER, FRANK E. WINCHELL, William S. Edwards, and Harry H. Platt. } No. 838.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

MOTION BY THE UNITED STATES TO ADVANCE.

The Solicitor General, on behalf of the United States, respectfully moves this court to advance the above-entitled cause for argument.

The case is before the court on a writ of error under the Criminal Appeals Act.

The indictment contains two counts. The first count charged the defendants with conspiring to defraud the United States by obtaining for one of their number, to wit, the defendant Foster, postmaster at North Brookfield, Mass., compensation in excess of that to which he was entitled by law and by the regulations of the Postmaster General. It is alleged that the defendant Foster, whose salary was based upon the gross receipts of his office, was to

sell to the defendant Winchell large quantities of stamps; these the latter was to forward to defendants Edwards and Platt, of New York City, officers of a certain New York corporation, to be there used by that corporation, and Foster, in making returns of the gross receipts of his office to the Auditor for the Post Office Department, was to include, and did include, receipts from these sales in order that his salary might be increased on the basis of such excessive returns; that all this was in violation of law and of the regulations of the Post Office Department, which forbade the postmaster to include in his return of gross receipts, made for the purpose of readjusting his salary, moneys received from the sale of stamps to be used in mailing matter at other post offices. Certain overt acts in pursuance of this conspiracy were alleged.

The second count charged the defendants with conspiring in substantially the same manner to violate section 206 of the Criminal Code, which penalizes the making of a false return by the postmaster.

Demurrers to the indictment were sustained upon the ground that the facts alleged did not constitute a violation of sections 37 and 206 of the Criminal Code; that the regulations of the Postmaster General with reference to the returns of gross receipts by postmasters were not within the power conferred upon him by the Revised Statutes, section 161; and that the postmaster was justly entitled to compensation on the basis of the gross receipts he so returned.

The decision vitally affects both the regulations and revenues of the Post Office Department in the matter of compensation of postmasters, and is thus of general public interest.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

MARCH, 1914.

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[redacted]

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
HAROLD A. FOSTER, FRANK E. WINCHELL, WILLIAM S. EDWARDS, and HARRY H. PLATT. } No. 838.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

STATEMENT.

This writ of error was sued out under the Criminal Appeals Act of March 2, 1907 (34 Stat. 1246), to review a decision of the District Court sustaining a demurrer to the indictment, and involving a construction of the statutes upon which the indictment was based.

The District Court thus interpreted and summarized the allegations of the indictment (R., 11 and 14):

> The first count of this indictment charges the defendants with having conspired to defraud the United States. The alleged object of the conspiracy was to obtain for the defendant Foster a larger salary as postmaster at North Brookfield than he was by law and by the regulations of the Post Office Department entitled to. This object was to be accom-

plished, according to the allegations of the indictment, in the following manner: One of the other defendants, Winchell, was to buy at the North Brookfield post office large quantities of stamps, which he was to send to the other two defendants, Edwards and Platt, at New York City, for use there. Foster was to include the proceeds of these sales in his returns of the gross receipts of the North Brookfield post office to the Auditor for the Post Office Department, but was not to report the sales to the First Assistant Postmaster General as unusual ones, to the end that the receipts from such sales should be deemed to be part of the gross receipts of said post office, and, consequently, should be made in part the basis upon which Foster's salary was determined. It is alleged that the regulations of the department required large or unusual sales for use outside of the district to be reported by the postmaster to the First Assistant Postmaster General, and further provided that such sales should not be included by the officials of the Post Office Department in the "gross receipts" upon which the postmaster's salary was fixed. * * *

The second count charges a conspiracy between the same defendants to commit "the offence denounced by section 206 of the Criminal Code." That section provides, inter alia, that whoever being a postmaster shall, for the purpose of fraudulently increasing his compensation, make a false return, statement, or account to any officer of the United States shall be punished.

The court held, in substance, that the indictment did not charge either a conspiracy to defraud the United States or to make a false return, because the object of each conspiracy was to obtain only what defendant Foster was legally entitled to, namely, an increase of salary *based upon the "gross receipts" of his office.* (R., 11 et seq.)

STATUTES INVOLVED.

Sections 37, 206, and 208 of the Criminal Code read as follows:

> SEC. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.
>
> SEC. 206. Whoever, being a postmaster or other person employed in any branch of the postal service, *shall make*, or assist in making, or *cause to be made*, a *false return, statement, or account to any officer of the United States*, or shall make, assist in making, or cause to be made, a false entry in any record, book, or account, required by law or the rules or regulations of the Post Office Department to be kept in respect of the business or operations of any post office or other branch of the postal service, for the purpose of fraudulently increasing his compensation or the compensation of the postmaster or any employee in a

post office; or whoever, being a postmaster or other person employed in any post office or station thereof, shall induce, or attempt to induce, for the purpose of increasing the emoluments or compensation of his office, any person to deposit mail matter in, or forward in any manner for mailing at the office where such postmaster or other person is employed, knowing such matter to be properly mailable at another post office, shall be fined not more than five hundred dollars, or imprisoned not more than two years, or both.

SEC. 208. Whoever, being a postmaster or other person employed in any branch of the postal service, and being intrusted with the sale or custody of postage stamps, stamped envelopes, or postal cards, shall * * * sell or dispose of, or cause to be sold or disposed of, postage stamps, stamped envelopes, or postal cards at *any point or place outside of the delivery of the office* where such postmaster or other person is employed; or *induce* or *attempt* to *induce, for the purpose of increasing the emoluments or compensation of such postmaster,* or the emoluments or compensation of any other person employed in such post office or any station thereof, or the allowances or facilities provided therefor, *any person* to *purchase* at *such post office or any station thereof,* or from any employee of such post office, postage stamps, stamped envelopes, or postal cards; *or sell or dispose of* postage stamps, stamped envelopes, or postal cards, *otherwise than as provided by law or the regulations of the Post Office Department,* shall be fined not more than

five hundred dollars, or imprisoned not more than one year, or both.

The act of March 3, 1883, entitled "An act to, adjust the salaries of postmasters" (22 Stat. 600), provides:

> That the respective compensation of postmasters of the first, second, and third classes shall be annual salaries, assigned in even hundreds of dollars, and payable in quarterly payments, *to be ascertained and fixed by the Postmaster General from their respective quarterly returns* to the Auditor of the Treasury for the Post Office Department, or copies or duplicates thereof, to be forwarded to the First Assistant Postmaster General, for four quarters immediately preceding the adjustment, at the *following rates*, namely:
>
> FIRST CLASS.
>
> *Gross receipts*, forty thousand dollars, and not exceeding forty-five thousand dollars, salary, three thousand dollars * * * etc.

Section 161 of the Revised Statutes reads as follows:

> The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

32917—14—2

The regulation of the Postmaster General in force at the time of the commission of the overt acts set forth in the indictment at bar, reads as follows:

> 2. In determining the "gross receipts" upon which the salary of a postmaster shall be based, stamps, stamped envelopes, and postal cards, sold in large or unusual quantities to any person to be used in mailing matter at other post offices will not be included, whether the sale be made with or without solicitation by the postmaster. When postage stamps or stamped paper are sold in large or unusual quantities, it shall be the duty of the postmaster to inquire into and ascertain whether or not the purchaser intends to use such postage stamps or stamped paper for mailing matter in his office, or other offices; and the fact shall be clearly indicated in his monthly stock report on Form 3240 to the Third Assistant Postmaster General. Upon evidence of neglect of the postmaster to ascertain and report such facts, he will be required to refund the amount of the excess salary and allowances he may have received on account of such sales. (Sec. 255, Supplement to Postal Laws and Regulations, ed. March 4, 1907.)

ASSIGNMENTS OF ERROR RELIED ON. (R. 15.)

1. Said court erred in holding that the object of the conspiracy, as alleged in said first count of the indictment, was a lawful one, to wit, to increase the gross receipts of the post office at North Brookfield, of which the defendant Foster was postmaster, by the purchase of postage stamps in large and unusual quantities, to be used by other defendants upon mail

matter to be deposited in the post office at New York, in the State of New York, or at some other than said North Brookfield post office.

2. Said court should have held that the object of the conspiracy alleged in the first count of said indictment was fraudulent, and that said count well alleged a conspiracy to defraud the United States in view of the provisions of section 208 of said Criminal Code, providing that "Whoever being a postmaster shall * * * induce, or attempt to induce, for the purpose of increasing the emoluments or compensation of such postmaster, any person to purchase at such post office * * * postage stamps * * * or sell or dispose of postage stamps, stamped envelopes, or postal cards, or otherwise than as provided by law, or the regulations of the Post Office Department, shall be punished."

3. Said court erred in its construction of the provisions of section 5 of the act of July 12, 1876, 2 U. S. Compiled Statutes, 2609, and of the act of March 3, 1883, 2 U. S. Compiled Statutes, 2619, entitled "An act to adjust the salaries of postmasters," and of section 161 of the Revised Statutes of the United States, and in holding that the regulations of the Postmaster General defining gross receipts of second-class post offices are inconsistent with the provisions of said statutes as appears from the opinion of the court upon demurrer, filed October 2, 1913.

4. Said court erred in holding that the second count of said indictment did not well allege a con-

spiracy by the defendants in violation of section 37 of said Criminal Code, to commit an offense against the United States, denounced by section 206 of said Criminal Code.

ARGUMENT.

THIS COURT HAS JURISDICTION.

The lower court said of the first count:

> The alleged object of the conspiracy was to obtain for the defendant Foster a larger salary as postmaster * * * than he was by law and regulations of the Post Office Department entitled to.

The law and regulations here referred to by the court must necessarily be any and all laws and regulations dealing with the salary a postmaster may lawfully receive.

As to the second count the court said:

> The second count charges a conspiracy between the same defendants to commit "the offence denounced by section 206 of the Criminal Code."

For the purpose of this review the lower court's interpretation of the indictment is conclusive (*United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Biggs*, ib. 518).

The indictment, though primarily founded on section 37 of the Criminal Code, depends ultimately upon section 208 as to the first count, and section 206 as to the second count, and on the act of March 3, 1883 (22 Stat. 600). The following questions were

before the court, and involved the construction of these statutes:

1. Whether "gross receipts" means actual receipts whether lawful or not, or means gross receipts from lawful sales only.

2. Whether sales made as charged are in violation of section 208, as being unlawfully "induced" sales.

3. Whether such sales are in violation of section 208, as having been unlawfully made outside of the post-office delivery, on the theory that the plan contemplated an ultimate sale to the user.

4. While there was no question of the construction of the regulation, but only as to its validity, yet its validity depended upon the construction of the statutes.

In view of the foregoing this court has jurisdiction to review the decision of the lower court.

Patton v. *United States*, 226 U. S. 525, 535.
United States v. *Sutton*, 215 U. S. 294.
United States v. *Keitel*, 211 U. S. 397.

ON THE MERITS.

COUNT ONE.

I.

The term "gross receipts" means receipts accruing from sales made pursuant to law and the regulations of the Post Office Department.

The court below said with respect to the statutes drawn in question:

> The effect of the various statutes taken together is to make the salaries depend upon

> the gross receipts, and to prevent such receipts (and consequent salaries) from being increased by improper methods. * * *

The term "gross receipts" first appears in the act of March 3, 1883 (supra) as a basis for fixing the compensation of postmasters. At that time the act of June 17, 1878 (20 Stat. 140, 141), was in force, which, among other things, prohibited postmasters from using stamps in the payment of debts, or in the purchase of merchandise or other salable articles. To these prohibitions section 208 of the Criminal Code of the United States added others, to wit, the selling or disposing or *causing* the selling or disposing of stamps at any point or place outside the delivery of the office, or the *inducing* or *attempting* to *induce* any person to *purchase* stamps for the purpose of increasing the compensation or emoluments of the postmaster, or selling stamps otherwise than as provided by law or the regulations of the Post Office Department.

The acts of the defendants as set forth in the first count of the indictment are such as fairly fall within the prohibitions against inducing the sale of stamps for the purpose of increasing the emoluments or compensation of the postmaster, and disposing or causing to be disposed of stamps outside the delivery of the office.

We have then, under the ruling of the court below, the proposition that because Congress has provided that compensation shall be based upon "gross receipts," and such term is unambiguous, therefore

the postmaster was entitled to compensation based thereon notwithstanding it was shown that such gross receipts covered moneys derived from sales which he was prohibited by law from making. The statement of the proposition works its destruction. The contention that the term "gross receipts" is a "definite and unambiguous expression" falls short of establishing that its scope is not delimited. The term "gross receipts" can not properly be construed otherwise than to mean gross receipts derived from authorized acts. No other intention can be imputed to Congress. Therefore where a postmaster does acts directed towards increasing his compensation, and Congress has not only prohibited him from doing those acts, but has provided punishment therefor, it must be conceded that if he succeeds in obtaining compensation as a result of such acts, he to that extent has defrauded the United States. Considering all the statutes covering the postal system, as in *pari materia*, which must be done, it is clear that the Government has never consented to pay compensation for the performance of prohibited acts.

To state it briefly, "gross receipts" mean nothing more than lawful gross receipts; not those derived from illegal acts. And it was not only within the power but it was the duty of the Postmaster General to provide by regulation that postmasters should report such unusual sales as those charged in the indictment at bar, and that they should not be considered in fixing compensation. The adoption of

a different rule would place it within the power of postmasters to fix their own compensation.

The ordinary rule would seem to be that a person can claim compensation only in consideration of the performance of duties falling within the scope of his employment, and he can not compel compensation for the voluntary performance of prohibited acts never acquiesced in. The present case does not constitute an exception to the well-established rule that one is not to be made a debtor without his assent. Indeed, under section 3679 R. S., as amended by section 3 of the act of February 27, 1906 (34 Stat. 48), Congress has expressed its policy in this regard by prohibiting Government officers from accepting voluntary service or personal service in excess of that authorized by law. The acts set forth in the indictment are, so far as the postmaster, one of the defendants, is concerned, both voluntary and in excess of law, and the burden rests upon the defendants to show that a claim for compensation could be bedded upon such acts.

The construction of the term "gross receipts" here contended for by the Government is that which has uniformly been followed by the Post Office Department, as shown by its regulation hereinbefore set forth, which has been in force a long period of time, as observed by the court below. (R., 13.) Therefore, under the ruling laid down by this court in *United States* v. *Johnston* (124 U. S. 236, 253), such departmental construction "should not be disregarded or

overturned except for cogent reasons and unless it be clear that such construction is erroneous."

A case quite in point is that of *Lewis Publishing Co.* v. *Wyman* (182 Fed. 13, 16; C. C. A. 8th Cir.), which involved the right of the Postmaster General to limit the number of sample copies which might be sent by the publisher under his "second-class" mailing privilege. The statute drawn in question, March 3, 1885 (23 Stat. 387), provided, inter alia, that second-class matter "including *sample copies*," should be entitled to transmission through the mails at the rate of one cent a pound. The contention was made that when a publisher has been accorded the second-class privilege, there is no limit to the number of sample copies that might be sent. Such contention was repudiated by the court, which upheld the power of the Postmaster General to limit the number of such sample copies.

The case at bar can not be distinguished in principle.

The following language of the court in *McKee* v. *United States* (164 U. S. 287, 293), is pertinent here:

> * * * Under such circumstances it is not only the right but it is the plain duty of the court to limit by a proper construction the otherwise boundless application of the general language used in the statute. As was said by Mr. Chief Justice Taney: "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to

> which it relates; and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it." *Brewer* v. *Blougher*, 14 Pet. 178, at 198; *Petri* v. *Commercial National Bank of Chicago*, 142 U. S. 644, 650.

The following cases furnish additional illustrations of the manner in which courts have limited the scope of the expression "gross receipts," and words of similar tenor:

> *State* v. *Illinois Cent. R. R. Co.* (92 N. E. 814, 847); *German Alliance Ins. Co.* v. *Van Cleave* (61 N. E. 94); *People* v. *Miller* (70 N. E. 10); *State* v. *Fleming* (97 N. W. 1063, 1069); *State* v. *Telephone Co.* (120 N. W. 534).

II.

The regulations of the Postmaster General here drawn in question are valid and not in excess of law.

The court below strikes down the regulation of the Postmaster General, now in issue, because as it construes the statutes, "gross receipts" necessarily cover all the receipts of the office, including those accruing from unlawful as well as lawful sales, and therefore it was not within the power of the Postmaster General to place any limit upon the scope of the term.

Here again the case of *Lewis Publishing Co.* v. *Wyman* (182 Fed., 13, 16), *supra*, is apposite. As

hereinbefore pointed out, the statute in that case authorized the sending of "sample copies," without restriction so far as the particular statute was concerned, by publishers holding a second-class mailing privilege, but nevertheless the Postmaster General adopted a regulation limiting the sample copies that might be sent to a number equal to that of the legitimate subscribers. In upholding this exercise of power, the court said:

> * * * It is contended that when a publisher has once been accorded the second-class privilege there is, as long as he retains it, no limit to the number of sample copies he can send through the mails at the pound rate. This contention is based on the language of the act of March 3, 1885, which prescribes a postage rate of one cent per pound or fraction thereof for publications of the second class "including sample copies." Act March 3, 1885, c. 342, 23 Stat. 387 (U. S. Comp. St. 1901, p. 2669). The act does not specifically place a limit on the number of sample copies, and it is claimed the department can therefore impose none. The words "including sample copies" were also in act March 3, 1879, c. 180, § 11, 20 Stat. 359. We think that under the authority conferred by Congress (Rev. St., § 161 [U. S. Comp. St. 1901, p. 80]) upon the head of the department to prescribe regulations not inconsistent with law for the performance of its business, the Postmaster General may lawfully impose such a limitation. The act of Congress does not purport

> to grant an unlimited privilege as to sample copies, and its very generality and indefiniteness invites a supplementary regulation. It is not necessary to the validity of a departmental regulation that specific statutory authority for it be discovered. It would be impracticable to set forth in the statutes all the rules for the conduct of the business of the great executive departments of the Government, and Congress has wisely confined itself to marking general outlines and imposing general limitations, leaving the subordinate and supplemental details suggested by practical experience to be prescribed by the heads of the departments. A departmental regulation must not be inconsistent with the statutes, but it may be by way of execution or supplement.
>
> See also *Campbell* v. *U. S.*, 107 U. S. 407; *Haas* v. *Henkel*, 216 U. S. 462.

Another case in point, by analogy, is that of *United States* v. *The Antikamnia Chemical Company* (No. 118 of the present term), which involved the validity of a regulation requiring labels on drugs to state not only a "derivative" but the parent drug from which it was obtained. It was contended that this regulation added to the law because such law, section 8 of the act of June 30, 1906 (34 Stat. 768), merely required the label to show the parent substance *or* derivative, and not both as attempted to be required by the regulation.

This court said, inter alia:

> First, as to the power of the Secretaries. It is undoubtedly one of regulation only—an administrative power only—not a power to alter or add to the act. The extent of the power, however, must be determined by the purpose of the act and the difficulties its execution might encounter. * * *
>
> * * * * *
>
> The query then occurs, such being the words and purpose, if the quantity or proportion of the substances or any derivative or preparation of them must be stated, is it administrative of the law or additive to it to require by regulation that not only the name of the derivative or preparation be stated but from what substance derived or of what it is a preparation? It certainly can not be said that the purpose of the law is not exactly fulfilled by the regulation. If it fulfils the purpose of the law it can not be said to be an addition to the law, unless, indeed, it can be contended that the law provided a means for its defeat by the easy device of mysterious names. * * *

So in the case at bar, it can not be successfully contended that the regulation of the Postmaster General does not fulfil the purpose of the law. The regulation declares that stamps sold in large or unusual quantities to any person to be used in mailing matter at an office other than that at which the stamps were purchased, shall not be regarded as a part of the gross receipts of such latter office for the

purpose of fixing compensation. The regulation in this respect appears to follow substantially the prohibition in section 208 of the Criminal Code against selling or disposing of stamps outside the delivery of the office or *causing* these things to be done. But even if it could be shown that the regulation is broader than the statutory prohibition just mentioned, the regulation would nevertheless be valid because the closing sentence in section 208, *supra*, also prohibits the sale of stamps otherwise than as provided by the regulations of the Post Office Department, thus recognizing the right of the Postmaster General to restrict the sales of stamps.

The regulation also requires monthly reports of unusual sales, and this portion, which is separable from that above considered, is clearly valid, for the Postmaster General, under his broad powers over the supervision of the postal system, could lawfully make any regulation reasonably calculated to aid him in discovering unlawful or fraudulent sales. The disclosure of large and unusual sales would direct the attention of the department to specific sales that ought to be investigated for the purpose of determining the lawfulness and good faith of such sales. And where, in a case like that at bar, a postmaster fails to report a sale which the law clearly prohibits, and the revenues from such sale are used in part as the basis of fixing compensation, the United States is certainly defrauded.

III.

The indictment may be sustained without reference to the regulation of the Postmaster General.

The court below construed the indictment as being predicated upon a violation of both the law and the regulation, so that a showing of a violation of either would seem to suffice (*Crain* v. *United States*, 162 U. S. 625, 636). This, however, raises a mere question of pleading which is not open on this writ of error. (*United States* v. *Stevenson*, 215 U. S. 190, 195.) We are therefore entitled to treat the indictment as charging a conspiracy to defraud by obtaining a compensation in excess of that authorized by law, thus eliminating all reference to the regulation. Viewed in this aspect, and for the reasons set forth under point *I* of this brief, it is submitted that the ruling of the court below was in error, and that the obtaining of compensation, based upon acts expressly prohibited by law, constitutes a defrauding of the United States, and this effect follows independently of any regulation upon the subject. (*United States* v. *Keitel*, 211 U. S. 370.)

A case in point is that of *United States* v. *Newton et al.* (48 Fed. 218 on demurrer), which was an indictment for conspiracy to defraud the United States by wrongfully increasing the weight of the mails during the so-called weighing period. The facts are thus stated by the court in its charge to the jury (52 Fed. 276, 277):

> * * * Briefly stated, the conspiracy so charged may be said to be that the defend-

ant, John C. Newton, entered into a conspiracy with Millard F. Oxford, and other persons to the grand jurors unknown, to defraud the United States; and that such defrauding was to be accomplished by, and had for its object, the unlawful and fraudulent procuring from the United States of money on the unlawful and fraudulent pretense and claim that under the statutes and arrangements then existing between the United States and the Des Moines & Kansas City Railway Company (of which company said Newton was at said date the vice gresident and general manager) said company was carrying over the post route extending over its line of road (which said line was a post route of the United States) an average daily weight of mail matter greatly in excess of the average mail matter actually carried over said post route; that the means to be used in carrying such conspiracy into effect was to load down the mails on said post route, during a period when the Government was weighing the mails carried thereon, with old and substantially valueless newspapers, which were during said weighing period to be mailed over said post route, but not mailed for any legitimate purpose, nor with any intent to use the said mails legitimately therefor, but with the unlawful and fraudulent intent thereby to create a fictitious and fraudulent average, on which the compensation to be paid by the United States to the said railway company for carrying the mail over said post route was to be based, and thus and thereby the Govern-

> ment be induced to pay out and should pay out for carrying said mails, and said railway company should thereby receive, an amount greatly in excess of the amount which in fact and of right, under the statutes with reference to carrying said mail would be paid by the Government, if, instead of such paying therefor on the basis of said fictitious and fraudulent average of mail matter carried, the payment therefor by the United States had been based on the average weight carried over said line of the legitimate mail matter—that is to say, the weight of mail matter other than said newspapers so mailed by the said Newton. * * *

Section 4002, Revised Statutes, provided that compensation should be based upon the "average rate of mails per day," to be ascertained by periodic weighings. No statute prohibited a carrier from taking advantage of such weighing periods to increase the average weight of the mails, by depositing in such mails large quantities of mailable matter which such carrier would not ordinarily do in the legitimate use of the mails. The indictment, however, was held to state a conspiracy to defraud the United States.

The case at bar presents a stronger case, for the sales which the conspirators made as a means of defrauding the United States were prohibited by law, viz, section 208 of the Criminal Code, while in the case just discussed the wrongful mailing of the matter was not prohibited by statute.

IV.

COUNT TWO.

The second count of the indictment charges a conspiracy to violate section 206 of the Criminal Code by making a false return for the purpose of increasing the compensation of the postmaster, one of the conspirators.

If, as pointed out by the court below, the postmaster was entitled to compensation based upon prohibited sales, then it may be conceded that the submission of a false report for the purpose of obtaining such compensation did not constitute a violation of law. It is clear, then, that this count of the indictment must stand or fall with count one.

V.

It is respectfully submitted that the judgment below should be reversed with directions to overrule the demurrer to both counts of the indictment.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

MARCH, 1914.

○

No. 882.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

HAROLD A. FOSTER, FRANK E. WINCHELL, WILLIAM S. HOWARTH, AND HARRY E. PLATT.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

REPLY BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
HAROLD A. FOSTER, FRANK E. WINCHELL, William S. Edwards, and Harry H. Platt.
No. 838.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

REPLY BRIEF FOR THE UNITED STATES.

While defendants in their brief, under heading "Argument," point I, contend that this court has no jurisdiction, they seem to concede away their argument by stating at page 3 of their brief:

> *The lower court gave exactly the same meaning to section 37, and, for that matter, to section 208,* as the Government asserted was the correct one, and yet found no crime was alleged.

This admits that the court below construed sections 37 and 208. So also does the third and seventh ground, respectively, of each of the demurrers (R., 9, 10); while the court below (R., 11) in speaking of defendants' contentions on the demurrers, says:

"The principal contentions of the defendants are that *by statute* Foster was entitled to a salary based

upon 'gross receipts;' that 'gross receipts' *included* all sales usual or unusual," etc.

In further support of his contention that this court has no jurisdiction, he cites *United States* v. *Keitel* (211 U. S., 370, 378), and *United States* v. *Patten* (226 U. S., 525, 535). The Government's brief also relies on these cases, and rightly. It is sufficient in the case at bar that the court below construed section 37, the conspiracy statute, and that it did so is made plain by its judgment that the acts charged in the indictment did not constitute a conspiracy to defraud the United States. The following language from the decision in *United States* v. *Patten* (226 U.S., 525, 535) is pertinent here:

> At the outset we are confronted with the contention that the decision is not based upon a construction of the statute. But to this we can not assent. The court could not have decided, as it did, that the acts charged *are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction.* Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

Counsel (Brief, p. 3, foot) say: "The only question was whether there was power to make a regulation *limiting its scope*" (here referring to the words "gross receipts" of the statute).

Substitute the words "its scope" used by counsel for the words "the condemnation of the statute"

and the court's sentence, above quoted, would mean precisely the same thing.

Before you can say whether a regulation does or does not "limit the scope" of a statute, you must first decide just what the scope, i. e., meaning is.

And of course in determining whether section 37 covers the acts of the present defendants, it became necessary for the court below, as it will be for this court, to also construe the act of March 3, 1883 (22 Stat., 600), and sections 206 and 208 of the Criminal Code of the United States.

And this court in *Grand Trunk W. Ry.* v. *Lindsay* (No. 425, October term, 1913, decided April 6, 1914), decides that it is not necessary to refer eo nomine to a statute, before it may be said that the cause of action is founded on the statute. It is enough if sufficient facts are alleged to bring the case within its operation.

The contention that the Government is attempting to present the case in this court upon a theory different from that upon which it was presented below, appears to be without merit, for the court, in its opinion at page 13 of the record, says:

> The object of the conspiracy, as alleged in the *first* count of the indictment, was to defraud the United States by securing for Foster a larger salary than he was entitled to under said regulation. "The offence here charged is predicated both upon the *violation of the law* and of the regulations made by the Postmaster General in pursuance of them." (Brief of United States attorney.)

This is the court's reading of the Government's brief below. As that brief itself is not contained in this record, we must *accept* the reading.

Furthermore, with respect to the first count the court below also said (Rec., 12), referring to the act of 1883 and section 208, etc., that—

> Other statutes forbid postmasters from * * * soliciting business for their own offices, from selling outside their own districts, etc. (*Crim. Code, sec. 208.*)
>
> The *effect* of the *various statutes taken together* is to make the salaries depend upon the gross receipts and to prevent such receipts (and consequent salaries) from being increased by *improper methods*. The entire matter appears to be adequately covered by the statutes.

As to the second count, the court said (Rec., 14):

> The second count charges a conspiracy between the same defendants to commit "the offence denounced by section 206 of the Criminal Code." That section provides, inter alia, that whoever, being a postmaster, shall, for the purpose of fraudulently increasing his compensation, make a false return statement or account to any officer of the United States shall be punished.
>
> * * * * *
>
> The crime denounced by section 206 of the Criminal Code includes two essential elements: (1) that a return shall be made which was known to be false; and (2) that such false return shall have been made "for the purpose of

fraudulently increasing compensation." It is not criminal under said section to make a false return except for the purpose therein stated. From the allegations of the second count of the indictment it clearly appears that the purpose of the alleged false return was to secure for Foster only what he was, in accordance with the views hereinbefore expressed, legally entitled to receive. *The making of a false return for such a purpose was not a crime under said section, and the alleged conspiracy to do so was not a conspiracy to commit the offence denounced thereby.*

There seems to be no room for dispute that the court has jurisdiction of the present writ of error.

POINT II OF DEFENDANTS' BRIEF.

Their argument under this point needs no further reply beyond the statement that the postmaster, in view of section 208, did not have the *legal right* to make the sales set forth in the indictment. The Government's main b ief sufficiently deals with this.

They attempt, but not successfully, to distinguish *United States* v. *Newton et al.* (48 Fed., 218, and 52 Fed., 276), cited by the Government.

The contention that the regulations recognize the right of defendants to make the "unusual" sales set out in the indictment can not be supported. On the other hand, the very fact that the regulation declares that such sales shall not be included as part of the "gross receipts" in fixing compensation stands as a condemnation of such sales. Again, the require-

ment of reports of such sales, together with all the facts, seems to demonstrate the department's disapproval of such sales, and that in framing the regulation it had in mind the prohibitions of section 208. This statute prohibited such sales. The regulations furnished a ready means of directing attention to sales that might be prohibited and within the condemnation of the statute. With such a report an inspector could intelligently start an investigation. The procurement of the information was within the power of the department. (*U. S.* v. *Birdsall*, No. 727, Oct. term, 1913, decided Apr. 6, 1914.)

We take issue with counsel's statement (brief 4) that "the Government concedes (brief 22) that if the *regulation* was invalid the second count fails." We said, "If entitled to compensation based on *prohibited* sales," and the third division of our argument (brief 19–21) was to the point that the statute *itself* (sec. 208), *regardless* of the regulation, made such sales *illegal* and forbad including them as "gross receipts in fixing salaries."

POINT III OF DEFENDANTS' BRIEF.

The meat of their argument under this heading is that the Postmaster General has sought by his regulation "to change the method which Congress has clearly provided for fixing salaries" and to diminish such salary.

The cases cited by defendants, viz, *United States* v. *George* (228 U. S., 14), *United States* v. *Eaton* (144

U. S., 687), *Morrill* v. *Jones* (106 U. S., 466), and *Williamson* v. *United States* (207 U. S., 425), decided nothing more than that the power to make regulations requires that the exercise of that power, as said substantially in *Williamson* v. *United States*, *supra* (p. 462), shall be in aid of the enforcement of the statute and "not destructive of rights which Congress had conferred."

In the case at bar the regulations do nothing more than secure the payment of the exact compensation that, and no less than, Congress intended to pay postmasters. Under the statutes drawn in question, and dealing with compensation, there can be no such thing as "gross receipts" derived from *prohibited* acts. It is not to be presumed that the purpose of any *legislation* is to enable a person to derive a benefit from doing an *unlawful* act, or that it can be given such a construction.

The Government concedes that the Postmaster General possesses no right to "increase or diminish a salary fixed by statute." The regulation of the Postmaster General, here in issue, is not an attempted exercise of any such power; but rather to prevent, by insuring discovery of, any false showing of "the amount of business done at his office." (*U. S.* v. *Wilson*, 143 U. S., 28.)

Of the cases cited by defendants at bottom of page 6 of their brief, decided by the Court of Claims, none of them seems to aid their case.

POINT IV OF DEFENDANTS' BRIEF.

This point of defendants' brief is devoted to showing the limited, if any, application of section 208 to the case; that the postmaster is entitled to compensation for "solicited business" even though "the postmaster is prohibited from soliciting," and that the ruling in *Lewis Pub. Co.* v. *Wyman* (182 Fed., 13), and certain other cases cited in the Government's brief, are not pertinent.

With respect to the first point, it may be stated that while the indictment charges a conspiracy to defraud the United States by obtaining for the postmaster a salary in excess of that to which he was entitled under the law and regulations, one of the means adopted to accomplish that end, so it is charged in the indictment, was the sale of stamps brought about by "the connivance" of the postmaster. This would seem to be a sufficient charge of an "induced" sale mentioned in section 208. See page 3 of Record. Moreover, the indictment at this point we are considering (p. 3, Rec.) seems to clearly show that in framing it the pleader had the prohibitions of section 208 in mind. And if his allegations are sufficient to bring the case within reach of that statute, no direct reference is needed. (*Grand Trunk W. Ry.* v. *Lindsay*, supra.)

The claim that the postmaster is entitled to compensation for "solicited" business, even though the postmaster is *prohibited* by law from *soliciting*, and that "solicited" sales are not "unlawful" (brief 8),

is opposed to both the spirit and the letter of section 208. This seems to be sufficiently dealt with in the Government's main brief. But it may be added that upon such a view, as the offense denounced by section 206 is a felony, the act of "soliciting," if followed by a false return, would result (1) in furnishing a necessary increase of official salary; and (2) forever disqualifying him from holding any Federal office. There is something wrong with a contention that leads to such results.

With respect to the Lewis Publishing Co. case cited by the Government, it would seem that its pertinence to the case at bar is so clear as to obviate the necessity of discussing it further. The defendants' attempt to distinguish the case is abortive. The same criticism applies to their attempt on pages 9 and 10 of their brief to diminish the pertinency of certain other cases cited by the Government in its brief. Defendants' comment on these cases is not enlightening.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

APRIL, 1914.

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Supreme Court of the United States.

October Term, 1913.

No. 838.

THE UNITED STATES,
PLAINTIFF IN ERROR,

V.

HAROLD A. FOSTER ET AL.

In Error to the District Court of the United States for the District of Massachusetts.

Brief for Defendants in Error.

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Supreme Court of the United States.

October Term, 1913.

No. 838.

THE UNITED STATES,
PLAINTIFF IN ERROR,
v.
HAROLD A. FOSTER ET AL.

Brief for Defendants in Error.

STATEMENT.

This was an indictment in two counts, returned to the District Court of the United States for the District of Massachusetts on September 9, 1913. In the first count the defendants were charged with conspiring to defraud the United States by improperly increasing the gross receipts of Harold A. Foster, the postmaster at North Brookfield, thus enabling him to obtain a larger salary than he would ordinarily be entitled to receive. The second count charged the defendants with a conspiracy to commit an offense in violation of section 206 of the Acts of March 4, 1909, in that the postmaster at North Brookfield should make false returns to the First Assistant Postmaster General for the purpose of fraudulently increasing his salary.

The Postmaster General made a regulation to the effect that, in determining the gross receipts of a post-office for the purpose of fixing the postmaster's salary,

unusual sales of stamps should not be included, and that a statement of all such sales should be made monthly to the First Assistant Postmaster General. It was alleged in the indictment that the defendants conspired to act in violation of this regulation.

The defendants demurred to both counts and, after hearing, the Court sustained the demurrers to both counts. The cause is now in this Court on a writ of error brought by the United States from the decision of the District Court for the District of Massachusetts.

Argument.

I.

The defendants contend that this Court has no jurisdiction in these proceedings.

The so-called Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. L. 1246, gives this Court jurisdiction on a writ of error taken by the United States in criminal cases:

> "from a decision sustaining a demurrer to any indictment where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded."

We contend that the first count of the indictment was based upon the General Fraud Statute, *i.e.*, sec. 37 of the Criminal Code, or sec. 5540, Rev. Sts. It was not based upon section 208 of the Criminal Code, and that section was not construed or interpreted by the Court.

So little was it intended to base the first count on section 208, that the original brief filed by the United States

attorney, did not contain any reference to it. In *United States* v. *George*, 228 U.S. 14, at page 19, the Court says:

> "To contend for one law as applicable in the trial court and another law in the appellate court would seem not only to be opposed to the requirement of the Statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals."

The lower Court gave exactly the same meaning to section 37, and, for that matter, to section 208, as the government asserted was the correct one, and yet found no crime was alleged. The reason was that the Court determined that the regulation of the Postmaster General, P.L. & R. 1907, sec. 255, par. 2, was beyond his power to enact under Revised Statutes, sec. 161, upon which alone he could claim the power.

The whole case resolved itself into the question of the power to enact the regulation. If this be a construction by the lower Court of Revised Statutes, sec. 161, it does not constitute a construction of the statute upon which the indictment is founded.

> *United States* v. *Keitel*, 211 U.S. 370, 378.
> *United States* v. *Patton*, 226 U.S. 525, 535, note, where cases are cited.

The words "gross receipts" were not interpreted. The only question was whether there was power in an administrative officer to make a regulation limiting its scope.

But assuming that the words "gross receipts" in the Act of March 3, 1883 (22 Stat. 600) were interpreted by

the lower Court, the indictment was not founded upon that statute.

This point of lack of jurisdiction applies also with reference to the second count of the indictment. That was based upon section 206 of the Criminal Code. The construction or interpretation of that statute was never in dispute. Whether it applied or not had to be determined by the validity of the regulation.

It is to be noted that the government, in its brief, abandons the first assignment of error, which appears on page 15 of the record, presumably because it is clear that the Court did not rule that the indictment did not well allege a conspirary under section 37 of the Criminal Code. There was no trouble with that section. The difficulty was with the regulation.

II.

If it is held that this Court has jurisdiction, then the real issue in the case is whether the lower Court was right in ruling that the Postmaster General had no power to pass the regulation. This is the purport of the various assignments of error. This issue goes to both counts of the indictment. The government concedes (Brief, p. 22) that if the regulation was invalid the second count falls, and we agree with the position taken by the government in its brief, "It is clear, then, that this [first] count of the indictment must stand or fall with count one" (Brief, p. 22).

We contend that the first count of the indictment cannot be sustained without reference to the regulation of the Postmaster General. The case of *United States* v. *Newton et al.*, 48 Fed. Rep. 218, 52 Fed. Rep. 276, 277, cited by the government, was a clear case of an attempt

to defraud the United States. The weights were padded with worthless stuff. In the principal case the postmaster had a legal right to make the unusual sales. The regulation recognizes that he did. It does not prohibit him from making the unusual sales. It merely requires him to report them after they have been made.

III.

The defendants contend that the regulation is beyond the power of the Postmaster General to enact, and that accordingly it is invalid.

The power of the Postmaster General is to "prescribe regulations not inconsistent with law for the governing of his department," etc. (Rev. Sts. sec. 161). We contend that the regulation in question *is* inconsistent with law; that in making the regulation the Postmaster General has attempted to legislate.

Postmasters are divided into four classes, those in the second class receiving salaries between $2000 and $3000.

> Section 5, Act of July 12, 1876 (2 U.S. Comp. Sts. 2609).

The salaries of second-class postmasters are fixed at $2000 per annum and are based upon gross receipts of $8000 and not exceeding $9000. These salaries are to be ascertained and fixed by the Postmaster General from the respective quarterly returns of the postmaster to the auditor of the treasury for the Post Office Department.

> Act of March 3, 1883 (2 U.S. Comp. Sts. 2619).

The salary of a second-class postmaster is dependent

upon the gross receipts of his office, in accordance with the returns to the auditor. The statute is very definite and clear on the subject.

The Postmaster General, by his regulation, proposes to base the salary of the postmaster upon gross receipts *less* unusual sales; in other words, upon something less than gross receipts. He has no right thus to change the method which Congress has clearly provided for fixing salaries.

> *United States* v. *George*, 228 U.S. 14.
> *United States* v. *Eaton*, 144 U.S. 687.
> *Morrill* v. *Jones*, 106 U.S. 466.
> *Williamson* v. *United States*, 207 U.S. 425.

This Court has definitely laid down the law that neither executive officers nor the appointing power can, during the service of an officer, either increase or diminish a salary fixed by statute.

> *Glavey* v. *United States*, 182 U.S. 595, 601.
> *United States* v. *Wilson*, 144 U.S. 24.

Many cases in that connection were decided in the Court of Claims.

> *Rush* v. *United States*, 35 C. Cls. R. 223.
> *Andrews* v. *United States*, 47 C. Cls. R. 51.
> *Adams* v. *United States*, 20 C. Cls. R. 115, 117.
> *Geddes* v. *United States*, 38 C. Cls. R. 428.
> *Whiting* v. *United States*, 35 C. Cls. R. 291.
> *Sherlock's Case*, 43 C. Cls. R. 161.
> *Jacobs* v. *United States*, 41 C. Cls. R. 452.

Other cases in which the validity of departmental regulations were considered are:

In re Page, 128 Fed. Rep. 317.
Borden v. *United States*, 132 Fed. Rep. 205.
United States v. *Symonds*, 120 U.S. 46.
Patterson v. *United States*, 181 Fed. Rep. 970.
Bruhl v. *Wilson*, 123 Fed. Rep. 957.
Hoover v. *Salling*, 110 Fed. Rep. 43.
Bruce v. *United States*, 202 Fed. Rep. 100.

Sometimes legislation provides for departmental regulations to care for details of administration of the particular legislation and in aid of it. The regulation in issue is not of that kind. It is the expression of the views of a particular administrative officer as to salaries to be paid to second-class postmasters. The regulation is not supplementary to the statute, but inconsistent with it.

If the regulation is invalid the conspiracy to do acts prohibited therein is not a conspiracy to defraud.

United States v. *Biggs*, 211 U.S. 507, 519, 521.
Williamson v. *United States*, 207 U.S. 425.

IV.

Cases Cited by the United States in its Brief.

Obviously, the government now bases its position upon section 208 of the Criminal Code. In so far as it can be at all applicable here, that section prohibits postmasters from inducing, or attempting to induce, any person to purchase stamps for the purpose of increasing the com-

pensation of such postmaster. The government must, accordingly, contend that the first count charges a conspiracy between the postmaster and the other defendants by which the former should induce the latter to purchase stamps. The short answer is that the indictment does not allege any such conspiracy. It alleges a conspiracy to defraud the United States in a certain manner, *i.e.*, causing unusual sales to be made and then failing to report them in accordance with the requirements of the regulation. This was the interpretation of the lower Court and it is conclusive.

It does not follow that a violation of sect[illegible] 208 is a fraud upon the United States. A p[illegible]master who solicits sales is subject to the penalties of that section, but the sales are not thereby rendered unlawful. The regulation in question establishes our contention clearly. It recognizes that such sales are part of the gross receipts, and its quarrel with the postmaster arises only if he fails to report them. It cannot be contended successfully that section 208 is authority for the enactment of the regulation. The statute specifically gives the postmaster his salary, based upon gross receipts, and these include solicited business even though the postmaster is prohibited from soliciting.

It is not of much weight in this case that the regulation has been in force for a long time, for, as stated by the lower Court, subordinate officials would be very reluctant to attack the validity of a regulation made by a superior officer. The rule in *United States* v. *Johnston*, 124 U.S. 236, 253, applies to an entirely different class of cases. There it was sought to hold parties responsible who had acted in reliance upon departmental construction of law.

In the case of *Lewis Publishing Co.* v. *Wyman*, 182 Fed. Rep. 13, 16, cited by the government on page 13 of its brief, an important phase of the opinion is the following:

> "The act of Congress does not purport to grant an unlimited privilege as to sample copies and its very generality and indefiniteness invites a supplementary regulation."

There the question was as to the number of sample copies one could send "second class." It was further noted that under section 14 of the Acts of March 3, 1879, there was excluded from second-class matter publications designed principally for advertising. Accordingly, the regulation was, in any event, in aid of that statute by aiming to determine bona-fide sample copies, based on the number of bona-fide subscribers. The regulation aimed at distinguishing between advertising magazines and those devoted to literature.

The case of *McKee* v. *United States*, 164 U.S. 287, 293, has no application here. The well-known doctrine was there enunciated that in construing words used by the legislature the whole Act in which the words appear should be considered. The Court says:

> "But we think a perusal of the whole act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress gathered from the provisions of the whole act."

To the same effect are the cases of *Brewer* v. *Blougher* and *Petri* v. *Commercial National Bank of Chicago.*

The case of *State* v. *Illinois Cent. R. R. Co.* and others, cited on page 14 of the government's brief, are cases of taxation of corporations on their gross receipts or gross earnings, and the Courts went into the question of what items are not included in determining such receipts or premiums. It is difficult to see any applicability to the case at bar.

The case of *United States* v. *The Antikamnia Chemical Co.*, 231 U.S. 654, is not in point. There the statute specifically empowered departmental heads to enact regulations for the administration of the law. The law itself required that the label should state the quantity or proportion of the drug, or any derivative or preparation of the same.

It was held in that case that the regulation was in aid of the law, and it would seem to be clear that it is. Furthermore, it was held in that case that the law did not need the assistance of the regulation. It should also be noted that that was not a criminal case. That was a case, however, where Congress expressly authorized the Executive Department to make rules to carry out specific provisions of this particular Act.

V.

We respectfully contend that the judgment below should be sustained.

PHILIP RUBENSTEIN,
TIMOTHY HOWARD,
Attorneys for the Defendants.

UNITED STATES *v.* FOSTER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

No. 838. Argued April 13, 14, 1914.—Decided May 4, 1914.

Where the case is one of statutory construction, consideration of the statute becomes necessary, and if the validity of departmental regulations is involved, a construction of the statute authorizing the head of the Department to make them is also necessary, and this court has jurisdiction under the Criminal Appeals Act of 1907 to review the judgment sustaining a demurrer to the indictment.

The theory of the act of March 3, 1883, is that every postmaster shall receive a salary dependent upon and regulated by the amount of business done at his office as represented by normal and natural—not unlawfully induced—sales of stamps.

Under § 161, Rev. Stat., authorizing heads of the Executive Departments to prescribe regulations not inconsistent with law, the Postmaster General has power to prescribe regulations requiring postmasters to make proper returns of sales of stamps at their respective offices; and such regulations have the force of law.

An indictment charging a postmaster and others with conspiring under § 37, Penal Code, to violate §§ 206 and 208, Penal Code, by the sale and purchase of stamps in large quantities to be used at other post offices so as to fraudulently increase his salary, and also charging violation of regulations of the Department in that respect, is sufficient.

THE facts, which involve the jurisdiction of this court under the Criminal Appeals Act of 1907 and the construction of statutes regulating the pay of postmasters and the power of the Postmaster General to make regulations in regard thereto, are stated in the opinion.

Mr. Assistant Attorney General Wallace for the United States.

Mr. Philip Rubenstein, with whom *Mr. Timothy Howard* was on the brief, for defendants in error:

This court has no jurisdiction under the act of March 2, 1907. No statute was construed or interpreted by the court below. *United States* v. *George*, 228 U. S. 14, 19.

The whole case resolved itself into the question of the power to enact the regulation. If this be a construction by the lower court of Rev. Stat., § 161, it does not constitute a construction of the statute upon which the indictment is founded. *United States* v. *Keitel*, 211 U. S. 370, 378; *United States* v. *Patton*, 226 U. S. 525, 535.

The words "gross receipts" were not interpreted. The only question was whether there was power in an administrative officer to make a regulation limiting its scope.

The regulation is beyond the power of the Postmaster General to enact, and accordingly is invalid. The regulation is inconsistent with law, and in making it the Postmaster General has attempted to legislate. This regulation proposes to base the salary of the postmaster upon

gross receipts less unusual sales; in other words, upon something less than gross receipts. He has no right thus to change the method which Congress has clearly provided for fixing salaries. *United States* v. *George*, 228 U. S. 14; *United States* v. *Eaton*, 144 U. S. 687; *Morrill* v. *Jones*, 106 U. S. 466; *Williamson* v. *United States*, 207 U. S. 425.

Neither executive officers nor the appointing power can, during the service of an officer, either increase or diminish a salary fixed by statute. *Glavey* v. *United States*, 182 U. S. 595, 601; *United States* v. *Wilson*, 144 U. S. 24.

Many cases in that connection have been decided in the Court of Claims. *Rush* v. *United States*, 35 Ct. Cls. 223; *Andrews* v. *United States*, 47 Ct. Cls. 51; *Adams* v. *United States*, 20 Ct. Cls. 115, 117; *Geddes* v. *United States*, 38 Ct. Cls. 428; *Whiting* v. *United States*, 35 Ct. Cls. 291; *Sherlock's Case*, 43 Ct. Cls. 161; *Jacobs* v. *United States*, 41 Ct. Cls. 452.

Other cases in which the validity of departmental regulations have been considered are: *In re Page*, 128 Fed. Rep. 317; *Borden* v. *United States*, 132 Fed. Rep. 205; *United States* v. *Symonds*, 120 U. S. 46; *Patterson* v. *United States*, 181 Fed. Rep. 970; *Bruhl* v. *Wilson*, 123 Fed. Rep. 957; *Hoover* v. *Salling*, 110 Fed. Rep. 43; *Bruce* v. *United States*, 202 Fed. Rep. 100.

Sometimes legislation provides for departmental regulations to care for details of administration of the particular legislation and in aid of it. The regulation in issue is not of that kind. It is the expression of the views of a particular administrative officer as to salaries to be paid to second-class postmasters. The regulation is not supplementary to the statute, but inconsistent with it.

If the regulation is invalid the conspiracy to do acts prohibited therein is not a conspiracy to defraud. *United States* v. *Biggs*, 211 U. S. 507, 519, 521; *Williamson* v. *United States*, 207 U. S. 425.

The cases cited by the United States do not sustain its position.

United States v. *Johnston*, 124 U. S. 236, 253; *Lewis Publishing Co.* v. *Wyman*, 182 Fed. Rep. 13, 16; *McKee* v. *United States*, 164 U. S. 287, 293; *Brewer* v. *Blougher*, 14 Pet. 178; *Petri* v. *Commercial National Bank*, 142 U. S. 644; *State* v. *Ill. Cent. R. R. Co.*, 92 N. E. Rep. 814; *United States* v. *Antikamnia Co.*, 231 U. S. 654, are not in point.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Indictment in two counts for conspiracy to defraud the United States, and to violate certain provisions of the postal laws. The object of the conspiracy and the manner of its execution are in substance, as charged in the indictment in the first count, as follows: Harold A. Foster was postmaster of the United States post-office at North Brookfield, Massachusetts, a second class office. The salary of the office was fixed by the Postmaster General, pursuant to law and the regulations established by him, at $2,000 a year, the salary being based and ascertained upon the gross receipts of the office for the twelve months next preceding the thirty-first of March, 1911. The law required the salary to be adjusted annually, and the next adjustment was required to be made by the Postmaster General in accordance with the gross receipts of the office as shown by the quarterly returns of the postmaster to the Auditor of the Post Office Department for the four quarters next preceding the thirty-first of March, 1912, the readjustment to take effect on the ensuing first of July, 1912. The Postmaster General was required by law and the established regulations in readjusting such salary not to include in the gross receipts of the office the moneys received by the postmaster for the sale of stamps to any person or persons in large quantities to be used in other

post-offices than the North Brookfield office for mailing purposes, or in that office if such matter in the ordinary course would not be deposited for mailing in the latter office.

Frank E. Winchell, of North Brookfield, was the president and general manager of the Oxford Linen Mills, a corporation having its usual place of business at North Brookfield, and William S. Edwards and Harry H. Platt, both of New York, were officers of the Sterling Debenture Company, a corporation having its place of business in New York, and they and Foster, well knowing the premises, conspired to defraud the United States of its money and property by Winchell purchasing from the United States in behalf of the Oxford Linen Mills, with the knowledge, consent and connivance of Foster, quantities of United States postage stamps to be sent to the Sterling Debenture corporation at New York, and Edwards and Platt as its officers were to cause it to use them in the prepayment of postage upon matter to be deposited in the post-office in New York or in some other office with the view and intent, by means of the purchase of stamps as stated, of irregularly and improperly increasing the gross receipts of the North Brookfield post-office for the twelve months beginning on the first of April, 1911, and ending on the thirty-first of March, 1912, and thereby enabling Foster, as such postmaster to make returns to the Auditor of the Post Office Department as a basis for the adjustment of Foster's salary for the fiscal year beginning July 1, 1912, which returns should include the sale of stamps so made to Winchell in addition to the sale of stamps made by Foster to other persons in the regular business of the North Brookfield office, with the intent and view of violating the regulations of the Post Office Department and for the purpose of fraudulently increasing Foster's salary, and with the further intent that such sales should, in violation of the Post Office regulations, be included and

deemed a part of the gross receipts of the North Brookfield office for the period above mentioned, and be made in part the basis of the readjustment of Foster's salary. All the acts done by Foster, Winchell, Edwards and Platt were done knowingly, wilfully and fraudulently for such purpose, that is, for the purpose of increasing the salary of Foster by a sum of money in excess of that which he would be lawfully entitled to receive and to cause such excessive sum to be paid to him and thereby cheat and defraud the United States thereof.

In pursuance of the unlawful conspiracy and to effect its object, on the first of July, 1911, Foster, as such postmaster, made a false return to the Post Office Department of the gross receipts of the North Brookfield office for the quarter ending June 30, 1911.

In further pursuance of the conspiracy and to effect its object, Winchell, on June 2, 1911, at North Brookfield, sent by registered mail to the Sterling Debenture corporation at New York a certain package, and also in pursuance of the conspiracy and to effect its object, Winchell bought from Foster postage stamps to the value of $200.

In a second count the indictment charges that the defendants unlawfully conspired to commit an offense against the United States, specified to be an offense denounced by § 206 of the act of March 4, 1909, entitled "An Act to codify, revise, and amend the penal laws of the United States," c. 321, 35 Stat. 1088, 1128, in that Foster, as such postmaster, should, in violation of the section, knowingly and fraudulently increase Foster's salary and compensation by knowingly and fraudulently failing to report, in the report of the gross receipts of his office required by law and the regulations of the Post Office Department, large and irregular sales of stamps to be made by Foster to Winchell as president and general manager of the Oxford Linen Mills, not to be used by that corporation, or by Winchell, or by any other person for

the mailing of matter at the North Brookfield office, but to be used for mailing matter at New York or in some post-office other than the North Brookfield office, with the intent and for the purpose of increasing the compensation of Foster as such postmaster. That in pursuance of such conspiracy Winchell, on June 2, 1911, purchased stamps of the value of $200.

In pursuance of the conspiracy and to effect its object, Foster, on the first of July, 1911, made a false return to the Auditor of the Post Office Department of the gross receipts of his office. An overt act by Winchell is charged.

The defendants were duly arraigned and pleaded not guilty, but subsequently withdrew their pleas of not guilty and filed demurrers to the indictment.

The grounds of demurrer were the same as to both counts and were: (1) The facts alleged did not constitute a crime; (2) nor an offense at common law; (3) nor a violation of the statutes or penal laws of the United States; (4) nor a violation of any valid regulation of the Postmaster General; (5) each and every one of his regulations is invalid.

The demurrers to the first count were sustained on the ground expressed by the court in its opinion, that the act of March 3, 1883 (2 U. S. Comp. Stat. 2619) provides that the salaries of postmasters of the second class shall be determined by the gross receipts of the office and that the Postmaster General had no power to qualify the requirement of the law by providing that unusual sales of stamps should not be included in estimating the gross receipts.

In passing upon the demurrers to the second count the court said that the count charged the defendants with a conspiracy to commit "the offense denounced by section 206 of the Criminal Code," that section providing, *inter alia*, that whoever being a postmaster shall, for the purpose of fraudulently increasing his compensation, make a false return, statement, or account to any officer of the

United States shall be punished. The crime denounced, the court said, included "two essential elements, (1) that a return shall be made, which was known to be false; and (2) that such false return shall have been made 'for the purpose of fraudulently increasing compensation.'" And the court observed that there could be no criminality unless a false return was made for the purpose stated, and that it appearing from the indictment that the alleged return made by Foster was to secure for him only what he was legally entitled to receive, he committed no crime under § 206, "and the alleged conspiracy to do so was not a conspiracy to commit the offense denounced thereby."

It will be observed, therefore, that the court held that the indictment charged neither a conspiracy to defraud the United States nor to make a false return, because the object of each conspiracy was to obtain only what Foster was legally entitled to, namely, an increase of salary based upon the gross receipts of his office, and that it was immaterial how they were increased or for what purpose increased.

The case was brought here under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, its provision being that this court has jurisdiction on writ of error taken by the United States in criminal cases "from a decision sustaining a demurrer to any indictment where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded." It is, however, contended by defendants in error that this court has no jurisdiction because, it is further contended, the district court gave the same meaning to the statutes upon which the indictment was based as the Government asserted was the correct one and only decided that the regulation of the Postmaster General was beyond his power to enact under Revised Statutes, § 161, upon which section alone he claimed the power. Nor, it is further contended, were the words "gross receipts" interpreted.

"The only question was," counsel say, "whether there was power in an administrative officer to make the regulation limiting its scope." It is further urged that if those words were interpreted the indictment was not founded upon the act of 1883, where they occur.

A lack of jurisdiction is also urged to review the ruling upon the second count, it being based on § 206 of the Criminal Code, the construction or interpretation of which was never in dispute. "Whether it applied or not," it is said, "had to be determined by the validity of the regulation."

We think the contentions are untenable. The court distinctly ruled that the indictment was in technical or formal details sufficient, and the contention of the parties not only submitted for decision the validity of the regulations of the Postmaster General but also the sufficiency and legality of the returns made by Foster under the provisions of the statutes. The court, it is true, gave especial prominence to the regulations, but the effect of the statutes independently of the regulations was necessarily considered. In other words, the court must have considered and decided that a conspiracy to establish a basis for a false return for the purpose of increasing Foster's salary was not prohibited by law; and, besides, a construction of the statutes was necessary to determine the validity of the regulation.

The case being one of statutory construction, a consideration of the statutes becomes necessary.

It is provided by the act of March 3, 1883, c. 142, 22 Stat. 600, that "the compensation of postmasters of the first, second and third classes shall be annual salaries, assigned in even hundreds of dollars, and payable in quarterly payments, to be ascertained and fixed by the Postmaster General from their respective quarterly returns to the Auditor of the Treasury for the Post Office Department . . . to be forwarded to the First As-

sistant Postmaster General, for four quarters immediately preceding the adjustment," according to the gross receipts, the amount of which not only determines the classes but the compensation of the offices within classes.

By § 4 of the act (22 Stat. 602), the Postmaster General is required to readjust the salaries of the first, second and third class at the beginning of each fiscal year. The same section fixed the salary of the postmaster at the Washington Post Office and provided that "in no case shall the salary of any postmaster exceed the sum of six thousand dollars, except in the city of New York, where the salary of the postmaster shall remain as now fixed by law, at eight thousand dollars."

Section 37 of the Criminal Code makes it an offense to conspire to defraud the United States in any manner or for any purpose.

Section 206 of the same code makes it a crime for a postmaster to make a false return, for the purpose of fraudulently increasing his compensation, or to induce or attempt to induce, for such purpose, any person to deposit mail matter in or forward in any manner for mailing at the office where such postmaster is employed, knowing such matter to be properly mailable at some other office.

Section 208 makes it a crime for a postmaster to dispose of stamps outside of the delivery of his office, or to induce or attempt to induce, for the purpose of increasing his compensation, the purchase of stamps, stamped envelopes or postal cards otherwise than as provided by law or the regulations of the Post Office Department.

By § 161 of the Revised Statutes it is provided that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, and the distribution and performance of its business. . . ."

In pursuance of the authority so given, the Postmaster General made the following regulation:

"2. In determining the 'gross receipts' upon which the salary of a postmaster shall be based, stamps, stamped envelopes, and postal cards, sold in large or unusual quantities to any person to be used in mailing matter at other post offices will not be included, whether the sale be made with or without solicitation by the postmaster. When postage stamps or stamped paper are sold in large or unusual quantities, it shall be the duty of the postmaster to inquire into and ascertain whether or not the purchaser intends to use such postage stamps or stamped paper for mailing matter in his office, or other offices; and the fact shall be clearly indicated in his monthly stock report on Form 3240 to the Third Assistant Postmaster General. Upon evidence of neglect of the postmaster to ascertain and report such facts, he will be required to refund the amount of the excess salary and allowances he may have received on account of such sales."

It is manifest from the quoted provisions that their purpose is to fix the salary of postmasters by the normal receipts of their respective offices and thereby keep the offices in relation, and to secure such end quarterly returns are required to be made by each postmaster and each is prohibited under criminal penalty from selling or disposing of stamps, stamped envelopes or postal cards outside of the delivery of his office, or selling or disposing of stamps, etc., otherwise than as provided by law or the regulations of the Post Office Department. In other words, the false returns and designated disposition of stamps are made crimes, and made crimes to secure the purpose of the law to keep the legal measure of the salaries unimpaired and the relation of the offices intact. It may, indeed, be that in one sense the United States would suffer no loss by the derangement of their relation; in another sense the United States would be defrauded. One of the postmasters would fraudulently obtain a greater salary than he was entitled to. But distinctly would the United

States be defrauded under the facts charged in the indictment, the postmaster at New York having a fixed salary of eight thousand dollars. See in this connection *Haas* v. *Henkel*, 216 U. S. 462, 479.

The sole theory of the act of 1883 is that every postmaster shall receive a salary dependent upon and regulated by the amount of business done at his office (*United States* v. *Wilson*, 144 U. S. 24, 28) under normal and natural sales of stamps, not unlawfully induced sales. This being the law, what does the indictment charge?

(1) The salary of the postmaster was to be adjusted in accordance with the returns of the gross receipts. (2) By the law and regulations of the Postmaster General the postmaster was not to include in the gross receipts moneys received from the sale of stamps in large or unusual quantities which were (a) to be used upon matter in some other post office or (b) used upon matter deposited at North Brookfield if in the ordinary and usual course of business such matter would be deposited at some other office. (3) The defendants conspired with Winchell, who purchased from Foster with Foster's connivance large quantities of stamps to be used by the Sterling Debenture corporation for mailing matter at New York or some other office than North Brookfield, and by such purchase to irregularly and improperly increase the gross receipts of the North Brookfield office, and thereby enable Foster to make returns as a basis for the readjustment of his salary in violation of the regulations of the Post Office Department and for the purpose of increasing his salary and thereby cheat and defraud the United States.

The second count charges a violation of § 206 of the Criminal Code, by conspiring, in the manner we have already set out and which need not be repeated.

It is clear from these provisions that it is the gross receipts from lawful sales which are to be the measure of the salary of the postmaster and that unlawfully induced

sales (§ 208), sales made "outside of the delivery of the office" (*Id.*), and sales "otherwise than as provided by law or the regulations of the Post Office Department" (*Id.*), are unlawful sales and regarded as criminal.

It would, indeed, be strange if unlawful and criminal sales were intended to constitute a part of the gross receipts upon which the postmaster's salary should be adjusted, and it would seem clear that to prevent such result the Postmaster General could legally exercise by the regulation under review the power given him by Rev. Stat., § 161. The regulation is purely administrative of the law. (1.) It notifies the postmaster that in the gross receipts of his office stamps in large or unusual quantities sold to be used in mailing matter at other post offices will not be included. This but executed the purpose of the law; adds nothing to it. *United States* v. *Antikamnia Chemical Co.*, 231 U. S. 654; *Lewis Publishing Co.* v. *Wyman*, 182 Fed. Rep. 13. (2.) It requires the postmaster to ascertain and report the intention of the purchaser of stamps or stamped paper in large or unusual quantities. This is properly supplemental to the first requirement and a reasonable supervision of the office and a means of discovering unlawful and fraudulent sales. (3.) It provides that for a neglect to so ascertain and so report the postmaster will be required to refund the amount of the excess salary he may have received on account of such sales. This provision is of doubtful validity, but it is not of material consequence to the questions now involved.

But if the regulation be regarded as invalid the indictment yet states an offense. It counts not only upon the regulation but upon the law, and the facts it alleges show a violation of the law.

Judgment reversed.